Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 1663

NORMAN KRASNA,

Petitioner,

vs.

ELIZABETH S. DAVIES, Executrix of the Estate of Valentine Davies, Deceased,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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IN THE

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NORMAN KRASNA,

Petitioner,

vs.

ELIZABETH S. DAVIES, Executrix of the Estate of Valentine Davies, Deceased,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Norman Krasna respectfully petitions this Court to issue a writ of certiorari so that this Court may review the judgment and decision made and entered in this case by the Court of Appeal of the State of California, Second Appellate District.

Opinions of the Courts Below.

The opinion of the California Court of Appeal, Second Appellate District, is reported at 12 Cal. App. 3d 1049 and is set forth, in its entirety, as Appendix A to this petition. The Supreme Court of the State of California, which denied Petitioner's Petition for Hearing, did not issue an opinion. A previous opinion of the Court of Appeal of the State of California on a prior appeal is reported at 245 Cal. App. 2d 535.

Jurisdiction.

The judgment of the Court of Appeal of the State of California, Second Appellate District, was entered on November 19, 1970 and a Petition for Hearing was timely filed with the Supreme Court of California on December 21, 1970. The Supreme Court of the State of California denied Petitioner's Petition for Hearing on February 10, 1971.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

Constitution and Statutes Involved.

The applicable provisions of the Constitution of the United States and the statutes involved are set forth in Appendix B.

Question Presented.

The Plaintiff allegedly submitted an idea for a bare literary plot, not copyrighted and not protectible under federal copyright law or under common law copyright, to the Defendant who allegedly utilized it. While the alleged submission was asserted to be in confidence, there was no express or implied in fact contract between the parties regarding the Defendant's use of the literary idea.

The question is whether, under circumstances where there has been no agreement to compensate, California may validly fashion a rule of law which grants Plaintiff a monopoly against the copyring of his idea and obligates the Defendant to compensate the Plaintiff for the use of an otherwise free and non-protectible literary plot.

Statement of the Case.

The case stood in the following posture in the Court below: The original plaintiff, Valentine Davies,[1] in his pleadings, had alleged that he had created certain literary ideas, had submitted them in confidence to Norman Krasna, a playwright and screenwriter, that Krasna used such ideas but did not pay Davies. Davies' cause of action, in the words of the District Court of Appeal (Appendix A, *infra,* p. 3) was on a theory of "implied in law contract and unjust enrichment."

We now summarize more than eleven (11) years of judicial proceedings—proceedings not yet brought to a definitive conclusion.

Founded on essentially the same basic allegations, Davies' suit, brought in 1959, embodied two theories or causes of action—one a contractual theory and the other an equitable, unjust enrichment theory. At the first trial, held in 1962, Davies was non-suited on the equitable count and the jury could not agree on the contractual aspect of the case. In a second trial, held in 1963, the jury rendered a verdict against Davies on his contract cause of action. On appeal, the District Court of Appeal (245 Cal. App. 2d 535 (1966) unanimously upheld the jury verdict on the contract cause of action but ruled that granting a nonsuit on Davies' equitable theory in the first trial was error.

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[1]While the original plaintiff, Valentine Davies, died after the commencement of the litigation, and his Executrix was substituted as a party, for convenience, we will refer to Valentine Davies as the Plaintiff below.

The trial court, after remand, granted Krasna's motion for judgment on the pleadings on grounds of *res judicata* and collateral estoppel. The Court below, however, reversed, holding that Davies was entitled to a trial on the merits on the second cause of action of his complaint and rejected the holding of the trial court that the bars of *res judicata* and collateral estoppel existed. The Court below (Appendix A, *infra*, pp. 6-9) also rejected Krasna's express contention that Davies could not have a protectible interest in his literary idea in view of the decisions of this Court in *Lear, Incorporated v. Adkins*, 395 U.S. 653 (1969); *Sears, Roebuck & Company v. Stiffel Company*, 376 U.S. 225 (1964); and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). The Supreme Court of California denied a Petition for Hearing.

Pursuant to leave of court obtained subsequent to the first appeal, by amended and supplemental answer, Krasna specifically raised the federal question argued herein [Clk. Tr. (on second appeal) p. 125, at p. 129]. In the present appeal, both in the District Court of Appeal and in the California Supreme Court, Krasna expressly contended, both on brief and in oral argument, that the doctrine of the *Lear, Sears* and *Compco* decisions, *supra*, precluded California from fashioning a doctrine that grants a protectible property interest to a mere literary idea.

Since the case is here on the pleadings of the parties, for purposes of this petition, we assume, *arguendo*, that Davies could prove to a jury all of his essential allegations of fact relevant to the only remaining issue, namely, the theory of unjust enrichment or implied in law contract.

THE REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED.

1. The decision below conflicts, in principle, with the decisions of this Court in *Lear, Incorporated v. Adkins,* 395 U.S. 653 (1969); *Sears, Roebuck v. Stiffel Company,* 376 U.S. 225 (1964); and *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234 (1964).

While the above-cited decisions, in striking down efforts to grant monopoly protection under doctrines of state law, where none exist under federal law, involved attempts to protect mechanical ideas and ideas for designs, and while the present case involves an idea for a literary plot, those cases and the present case all involve the same fundamental issue of what protection a state may afford to pure ideas.

This Court has plainly held that ideas to which Congress has not afforded monopoly protection under the patent laws cannot be afforded monopoly protection by a state created rule and has squarely held that, at the very least, absent an agreement to make payment, one who utilizes an unprotectible idea of another, cannot be compelled by a state to pay for that use. Indeed, by expressly repudiating the estoppel doctrine in *Lear,* this Court has directly ruled that a contracting party may disavow his agreement and refuse to pay royalties on a showing that the idea has no federal protection. Such is the strength of the overriding "federal policy favoring the full and free use of ideas in the public domain." *Lear, Incorporated v. Adkins, supra,* at page 16.

The Court below, by contrast, would grant Plaintiff monopoly protection against the copying of an idea

for a literary plot, which Congress has not so protected, and would require Defendant to pay for the use of that idea, even though he never expressly or impliedly agreed to do so.[2] Its decision cannot be reconciled with the opposite holdings of *Lear, Sears* and *Compco.*

In addition to the estoppel question, *Lear* also involved the issue whether, during the express terms of a contract period the licensee can be held to his agreement to pay royalties on what may be an unpatentable idea; on this point, the California court was requested by this Court to re-examine its position (395 U.S. 653, 675).

While the present case is a stronger one and did not fall within this aspect of *Lear,* since no agreement, express or implied, existed, nonetheless the Court below was requested by Krasna to make the kind of re-examination contemplated by *Lear.* The District Court of Appeal expressly refused to follow the invitation extended by *Lear,* to "reconsider the theoretical basis"

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[2]As we have already stated, since the case is here on the pleadings of the parties, all of Plaintiff's allegations relating to the implied in law contract or unjust enrichment theory are, for purposes of this Court's review, assumed to be true. Consequently, even though these allegations are controverted, and for the most part have been found against Davies by the jury's general verdict, finally affirmed on appeal that there was no express or implied in fact contract, we assume that Davies could prove to a jury: (a) that he submitted his idea for a literary plot under circumstances where Krasna had access to it, (b) that Krasna copied and utilized the plot, and (c) that the submission was made in confidence and that this created a special relationship between the parties of trust and confidence.

of the decisions of the California courts and, instead, stated that (Appendix A, *infra*, p. 8), "Unless and until our own Supreme Court advises us to the contrary" the present case must be determined (*id.*), "on the basis of the long line of California literary property cases. . . ."[3] The Supreme Court of California, although similarly requested by Krasna to undertake such reconsideration, by denying the Defendant's Petition for Hearing, unmistakably approved a doctrine under which, in the teeth of a congressional policy, the free flow of ideas is stifled and the state permits a toll to be exacted from any user of an idea even though it is non-protectible under the paramount federal policy.

2. The decision below presents a federal question of substance, involving an important matter of copyright law, which ought to be squarely decided by this Court. Quite plainly, all aspects of the entertainment industry of the United States—motion pictures, legitimate theatre, television, radio, phonograph records and other areas involving music—are directly affected by a holding that the purveyors of mere ideas (not protectible by copyright) can successfully claim, under some local rule of law, protection against use by others. A long history of vexatious litigation, both in Cali-

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[3]Another case in which the California District Court of Appeal avoided the same kind of reconsideration, although it was directly requested to do so in the light of *Lear*, is *Donahue v. United Artists*, 2 Cal. App. 3d 794, 808 (1969), Petition for hearing denied by California Supreme Court.

fornia and elsewhere,[4] does not reveal the full scope of the problem for it does not disclose the extent to which agreements for payment are made and adhered to under the assumption that there is a legal duty to pay compensation, nor does it reveal the extent to which voluntary payments are made, even in the ab-

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[4]*See, for example,* the following cases for some of the situations where there was an alleged submission of literary ideas or program format with some claim that the circumstances of the submission led to an implied duty to pay for its use: *Desny v. Wilder,* 46 Cal. 2d 715, 299 P. 2d 257 (1956); *Kurlan v. Columbia Broadcasting System, Inc.,* 40 Cal. 2d 799, 256 P. 2d 962 (1953); *Weitzenkorn v. Lesser,* 40 Cal. 2d 778, 256 P. 2d 947 (1953); *Golding v. R.K.O. Pictures, Inc.,* 35 Cal. 2d 690, 221 P. 2d 95 (1950); *Stanley v. Columbia Broadcasting System, Inc.,* 35 Cal. 2d 653, 221 P. 2d 73 (1950); *Minniear v. Tors,* 266 Cal. App. 2d 495, 72 Cal. Rptr. 287 (1968); *Henried v. Four Star Television,* 266 Cal. App. 2d 435, 72 Cal. Rptr. 223 (1968); *Ware v. Columbia Broadcasting System, Inc.,* 253 Cal. App. 2d 489, 61 Cal. Rptr. 590 (1967); *Donahue v. Ziv Television Programs, Inc.,* 245 Cal. App. 2d 593, [second appeal] 2 Cal. App. 3d 794 (1970); *Colvig v. KSFO,* 224 Cal. App. 2d 357, 36 Cal. Rptr. 701 (1964); *Heckenkamp v. Ziv Television Programs, Inc.,* 157 Cal. App. 2d 293, 321 P. 2d 137 (1958); *Kovacs v. Mutual Broadcasting System, Inc.,* 99 Cal. App. 2d 56, 221 P. 2d 108 (1950); *Official Airlines Schedule Information Service, Inc. v. Eastern Air Lines, Inc.,* 333 F. 2d 672 (5th Cir. 1964); *Noble v. Columbia Broadcasting System,* 270 F. 2d 938 (D.C. Cir. 1959); *American Visuals Corporation v. Holland,* 261 F. 2d 652 (2d Cir. 1958); *Hamilton National Bank v. Belt,* 210 F. 2d 706 (D.C. Cir. 1953), aff'g 108 F. Supp. 689 (D. D.C. 1952); *Herwitz v. National Broadcasting Company, Inc.,* 210 F. Supp. 231 (S.D.N.Y. 1962); *O'Brien v. RKO Radio Pictures, Inc.,* 68 F. Supp. 13 (S.D.N.Y. 1946); *Bowen v. Yankee Network, Inc.,* 46 F. Supp. 62 (D. Mass. 1942); *Stone v. Goodson,* 8 N.Y. 2d 8, 167 N.E. 2d 328, 200 N.Y.S. 2d 627 (1960); *Grombach Productions, Inc. v. Waring,* 293 N.Y. 609, 59 N.E.2d 425 (1944); *Robbins v. Frank Cooper Associates,* 19 App. Div. 2d 242, 241 N.Y.S. 2d 259 (1963); *Silver v. Television City, Inc.,* 207 Pa. Super. 150, 215 A. 2d 335 (1965).

sence of consensual arrangements, merley to avoid the necessity of litigation.[5]

The issue of this case, moreover, transcends the entertainment industry. It affects every major industry which is constantly bombarded with all kinds of unsolicited ideas, such as for advertising slogans, marketing and merchandising techniques, improvements on products, and other business ideas,[6] together with demands for payments.

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[5]The long course of the present litigation and its attendant costs is indicative of how tempting it may be to buy off the claimant rather than to be vindicated by the assertion of legal rights. The accusation of "theft", however, leveled against a well-known author cannot be lightly dismissed by him and his reputation cannot be simply "purchased".

[6]We list some of these types of cases:

Publicity or Marketing Campaigns: *Hampton v. La Salle Hat Co.*, 88 F. Supp. 153 (S.D.N.Y. 1949); *Plus Promotions, Inc. v. RCA Mfg. Co., Inc.*, 49 F. Supp. 116 (S.D.N.Y. 1943); *Stone v. Liggett & Myers Tobacco Co.*, 260 App. Div. 450, 23 N.Y.S. 2d 210 (1940); *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y.S. 2d 892 (1940); *Liggett & Myers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1935); *Thomas v. R. J. Reynolds Tobacco Co.*, 350 Pa. 262, 38 A. 2d 61 (1944); *John W. Show Advertising, Inc. v. Ford Motor Co.*, 112 F. Supp. 121 (N.D. Ill. 1953); *Thompson v. California Brewing Co.*, 150 Cal. App. 2d 469, 310 P. 2d 436 (1957); *Brunner v. Stix, Baer & Fuller Co.*, 352 Mo. 1225, 181 S.W. 2d 643 (1944); *Bristol v. Equitable Life Assurance Soc. of the United States*, 132 N.Y. 264, 30 N.E. 506 (1892).

Slogans: *Healey v. R. H. Macy & Company*, 251 App. Div. 440, 297 N.Y.S. 165, aff'd 277 N.Y. 681, 14 N.E. 2d 388 (1938); *How. J. Ryan & Associates, Inc. v. Century Brewing Assn.*, 185 Wash. 503, 55 P. 2d 1053 (1936); *Carneval v. William Morris Agency, Inc.*, 124 N.Y.S. 2d 319 (1953), aff'd 137 N.Y.S. 2d 612; *Bailey v. Haberle Congress Brewing Co., Inc.*, 193 Misc. 723, 85 N.Y.S. 2d 51 (1948).

Business Ideas: *Anderson v. Distler*, 173 Misc. 261, 17 N.Y.S. 2d 674 (1940); *Puente v. President and Fellows of Harvard College*, 149 F. Supp. 33 (D. Mass. 1957); *Rodriguez v. Western Union Telegraph Co.*, 18 N.Y.S. 759, 259 App. Div. 224 (1940);

(This footnote is continued on the next page)

Just as *Lear, Incorporated v. Adkins* finally laid to rest the supposition that a monopoly in ideas in the physical world could be protected by a state created fiction of estoppel, it is important that this Court lay to rest the supposition that a monopoly against copying other types of ideas, not available for protection under the copyright laws, can be supported by other state created legal fictions, such as California has attempted to do here.

3. The decision below is erroneous and should be reversed.

Under the decision of the Court below, the Defendant must be subjected to still another trial and yet,

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Matarese v. Moore-McCormick Lines, Inc., 158 F. 2d 631 (2d Cir. 1946); *Krisel v. Duran*, 258 F. Supp. 845 (S.D.N.Y. 1966), *see also* 303 F. Supp. 573 (1969).

Manufacturing Ideas: *Davis v. General Foods Corporation*, 21 F. Supp. 445 (S.D.N.Y. 1937); *Galanis v. Procter and Gamble Corp.*, 153 F. Supp. 34 (S.D.N.Y. 1957); *American Mint Corporation v. Ex-Lax, Inc.*, 263 App. Div. 89, 31 N.Y.S. 2d 708 (1941); *Cobb v. Southern Plaswood Corporation*, 171 F. Supp. 691 (W.D. Ark. 1959); *Mitchell Novelty Co. v. United Mfg. Co.*, 199 F. 2d 462 (7th Cir. 1952); *Jennings v. McCall Corporation*, 224 F. Supp. 919 (W.D. Mo. 1963); *Thomson Machinery Company v. LaRose*, 306 F. Supp. 681 (E.D. La. 1969); *Young v. Ralston-Purina Co.*, 88 F. 2d 97 (8th Cir. 1937); *Williamson v. New York Central R. Co.*, 258 App. Div. 226, 16 N.Y.S. 2d 217 (1939).

Automotive Designs: *De Filippis v. Chrysler Corporation*, 53 F. Supp. 977 (S.D.N.Y. 1944), aff'd 159 F. 2d 478 (2d Cir.), cert. denied 331 U.S. 848, rehearing denied 332 U.S. 786 (1947); *Lueddecke v. Chevrolet Motor Co.*, 70 F.2d 345 (8th Cir. 1934); *Booth v. Stutz Motor Car Co. of America, Inc.*, 56 F. 2d 962 (7th Cir. 1932); *Von Rensselaer v. General Motors Corporation*, 223 F. Supp. 323 (E.D. Mich. 1962).

Advertising Design: *Nash v. Alaska Airlines, Inc.*, 94 F. Supp. 428 (S.D.N.Y. 1950).

Credit Plan: *Moore v. Ford Motor Co.*, 43 F. 2d 685 (2d Cir. 1930), aff'g 28 F. 2d 529 (1928).

in no possible way can a verdict against the Defendant be sustained, short of a holding by the California courts that, contrary to the principles settled by *Lear, Incorporated v. Adkins, supra,* the Plaintiff has a protectible right in the mere idea for a literary plot and that such a right is protectible simply because it was allegedly submitted in confidence. As we have stated, we assume for this purpose, [although all of the essential facts have always been controverted by the Defendant], that Plaintiff could establish that his idea for a story plot was submitted in confidence too, and was utilized by Defendant.

Under these assumed facts, the narrow federal question is synthesized: Can California create, under judicial doctrines of equity, a protectible property right in a literary idea where none exists under the paramount federal policy, thereby creating a monopoly privilege, contrary to the congressional intendment? The decision of the Court below is plainly wrong in answering that question in the affirmative.

Plaintiff's literary idea, concededly, is not protectible under the Copyright Act, Title 17, U.S.C. Sections 1 *et seq.*, nor under the common law copyright exception set forth in Section 2 of the Copyright Act.[7] If the Plaintiff is to succeed at all it must be under a

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[7]A literary theme or plot is not subject to copyright protection, either under the Copyright Act or under California common law copyright. *Dymow v. Bolton,* 11 F. 2d 690 (2d Cir. 1926); *Weitzenkorn v. Lesser,* 40 Cal. 2d 778, 789, 794-795 (1953). As California Civil Code Section 980(a) makes clear, it is only in the "representation" or "expression of a composition in letters or art" that the author has an "ownership" interest.

California created equitable rule that would say that since the Plaintiff submitted his idea in a supposed relationship of trust and confidence, equitable principles impose an obligation on the Defendant to pay.

But a state created equitable rule of this kind, in essence, is no different from the equitable rule of estoppel struck down by *Lear,* which striking down was agreed to by all members of this Court.

It will not do to contend that equity ought to intervene because the submission would not have been made, and that the Defendant would otherwise not have had access to this idea, except for the relationship of trust and confidence between the parties for, in the *Lear* type of situation, this Court was confronted with the desire of the (p. 674) States to "protect the owners of unpatented inventions who are willing to disclose their ideas to manufacturers only upon payment of royalties." Yet *Lear* unequivocally held that such a state policy must yield to the federal policy. The situation here is even clearer, for *Lear* (p. 688), in balancing, on the one hand, the principle which forbids a contracting party to repudiate his agreement, and on the other, the strong federal policy that unprotectible ideas "be dedicated to the common good," found the scales heavily weighed against the former and permitted the free use of ideas even though they were disclosed to a licensee who contracted for payment. Certainly an even stronger federal policy must exist where, as here, the Defendant *never agreed* to pay for the use of an idea, an idea which, in time honored tradition, is, and should be, "free as air."

Wherefore, it is respectfully requested that a petition for a writ of certiorari issue to the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Elizabeth S. Davies, Executrix of the Estate of Valentine Davies, Deceased, Plaintiff and Appellant, vs. Norman Krasna, Defendant and Respondent. Civ. No. 35638, Superior Ct. No. 734658.

APPEAL from a judgment of the Superior Court, County of Los Angeles. Joseph L. Call, Judge. Reversed.

Max Fink, John J. Waller, Sanford B. Schulhoffer, Jr., and R. Stephen Duke, for Plaintiff and Appellant.

Mitchell, Silberberg & Knupp and Arthur Groman, for Defendant and Respondent.

This is an appeal by plaintiff Davies from a judgment entered in favor of defendant Krasna after the trial court granted defendant's motion for judgment on the pleadings.

Two trials and a prior appeal have occurred in this case. In the first trial defendant's motion for nonsuit was granted as to plaintiff's cause of action on an implied in law obligation for breach of trust or confidence and the jury was unable to reach a verdict as to the cause of action on an implied in fact contract. In the second trial the jury returned a verdict for defendant on the first cause of action on the implied in fact contract. Plaintiff appealed. The appellate court, in *Davies v. Krasna* (1966) 245 Cal.App.2d 535, affirmed the judgment on the first cause of action and reversed the judgment of nonsuit on the second cause of action on the implied in law obligation for breach

of trust or confidence. The Supreme Court denied a hearing.

The case proceeded to the superior court, after remittitur, on the pleadings. Defendant filed a motion for summary judgment on grounds of estoppel by judgment and res judicata. The motion was denied. Defendant moved for judgment on the pleadings on the above same grounds. The trial court granted defendant's motion on the pleadings on the grounds of res judicata and collateral estoppel.

The pleadings were as follows: Plaintiff alleged that Valentine Davies created certain literary ideas and that he submitted them to Norman Krasna, a playwright and screenwriter, on or about December 6, 1951; that Krasna agreed to pay Davies if he used them; and that Krasna did use them but did not pay Davies. Krasna, on the other hand, alleged that Davies never submitted his story to Krasna in 1951, or any other time, and that Krasna conceived of the story a full year before Davies allegedly conceived the story. The original plaintiff, Valentine Davies, died before the first trial and his executrix has conducted proceedings.

Plaintiff argues that the judgment in defendant's favor on the first cause of action on the theory of implied in fact contract is not res judicata as to plaintiff's second cause of action on the theory of an implied in law obligation. The defendant contends that plaintiff's theories of implied in fact contract and implied in law obligation are not two separate causes of action, but mere separate counts based on one cause of action, such that the court's finding in favor of defendant on the "implied in fact contract" count would bar plaintiff

under the doctrine of res judicata from trying the case on the "implied in law obligation" count.

The basic issue before this court is whether the trial court erred in concluding that plaintiff was precluded from trying the case on the theory of "implied in law contract and unjust enrichment" by the doctrine of res judicata and collateral estoppel. We find that the trial court erred in not granting plaintiff a trial on the merits on her second cause of action in "implied in law contract."

The trial court erred in depriving plaintiff of a trial on the merits as to her second cause of action for breach of trust and confidence on an implied in law obligation because (1) the law of the case as set forth by the prior appellate court decision in this case established that nonsuit was improperly granted as to the second cause of action, and that plaintiff was entitled to a trial on the merits, and (2) because plaintiff's cause of action as to implied in law obligation is a separate cause of action from an implied in fact contract and therefore not barred by res judicata.

I

Plaintiff's right to a trial on the merits was established in the first appeal of the case. The Court of Appeal in the first appeal in the case at bench (*Davies v. Krasna* (1966) 245 Cal.App.2d 535, 550, 560) affirmed the judgment in favor of defendant on the first cause of action, but reversed the nonsuit as to the second cause of action on implied in law obligation. That court said:

> "Consequently, there was an issue of fact as to whether, in breach of his duty as heretofore stated, Mr. Krasna had improperly made use of Mr. Davies' idea for his personal purposes. (See

Teich v. General Mills, Inc., 170 Cal.App.2d 791, 797-798 [339 P.2d 627].) Under the governing law, the nonsuit was improperly granted as to the second cause of action.

". . .

"It is therefore ordered:

". . .

"3. That the portion of the amended judgment granting a nonsuit as to the second cause of action is reversed;"

Thus, the Court of Appeal in the prior appeal deliberately preserved plaintiff's rights to a trial on the merits as to the second cause of action. It is the general rule that all the issues and questions adjudicated on a prior appeal are the law of the case on all subsequent appeals and will not be reconsidered. (*Allen v. Cal. Mutual B. & L. Assn.* (1943) 22 Cal.2d 474.) "Where questions presented on a subsequent appeal were necessarily involved in a former appeal, and the conclusion arrived at on the former appeal could not have been reached without expressly or impliedly deciding the question subsequently presented, the decision on the former appeal is the law of the case and rules throughout all subsequent stages of the action." (*Stock v. Meek* (1952) 114 Cal.App.2d 584, 586.)

The identity or non-identity of the two causes of action must have been examined by the appellate court in the first appeal, and by reversing the nonsuit on the second cause of action, the appellate court has determined that the two causes of action could not be identical nor is plaintiff's second cause of action barred by res judicata or collateral estoppel.

Defendant argues that the earlier reversal by the appellate court did not necessarily remand the case for

a new trial on the merits as to the second cause of action, and that if the court did not intend a retrial, then the question of res judicata was not impliedly determined in the first appeal. While it is true that "judgment reversed" does not call for a retrial when it is clear the court's intent was otherwise (*Stromer v. Browning* (1968) 268 Cal.App.2d 513, 518), the general rule is that unqualified reversal without directions by the Court of Appeal is to remand the case for a new trial on the merits. (*Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal.2d 547; *Weightman v. Hadley* (1956) 138 Cal.App.2d 831.)

In the case at bench there is no reason to apply any rule other than the general rule, providing for retrial after reversal. There is no showing here that the appellate court's intent was not to remand the case. The court states in the first appeal "there was an issue of fact" as to whether Krasna breached his duty and the "nonsuit was improperly granted as to the second cause of action." Where else could this remaining issue of fact be determined if not in a new trial on the merits?

II

In any case, the first and second causes of action are not merely different counts of the same cause of action, but are separate causes of action. The implied in fact cause of action clearly involves a contractual right, but the implied in law obligation is in reality not a contract at all. In *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, the court said at page 794:

> "It is unnecessary for the pleading to distinguish between the contract implied in fact and the contract implied in law, or quasi contract, *but the elements which must be proved for recovery upon each of them are quite different.*

". . . The so-called 'contract implied in law' *in reality is not a contract.* [Citations.] *'Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.*" [Citation.] Quasi-contractual recovery is based upon benefit accepted or derived for which the law implies an obligation to pay." (Emphasis supplied.)

If we understand him correctly, counsel for defendant has argued to us that, because some of the essential elements of a cause of action for recovery on the theory of a contract implied in law were also in issue under the cause of action for recovery on the theory of a contract implied in fact, the jury's verdict adverse to plaintiff on the first cause of action is necessarily res judicata as to the second cause of action. The result does not follow. Although special interrogatories were submitted to the jury at the trial, they were not lawfully answered; all that we have is a general verdict in favor of defendant on the first cause of action. That verdict could have been based on a finding by the jury that there was no contract—express or implied in fact; we have no evidence that the jury, by the requisite number, found in favor of defendant as to any issue of fact involved in a suit based on the theory of a contract implied in law. Under these circumstances no adjudication binding on plaintiff as to the second cause of action has been shown. (Cf. *Braslow v. Kelly* (1957) 151 Cal.App.2d Supp. 852.)

III

Defendant argues that the Supreme Court case of *Lear v. Adkins* (1969) 395 U.S. 653 [23 L.Ed.2d

610, 89 S.Ct. 1902] expressly required the California courts to reconsider whether state law may protect unpatented ideas, and defendant appears to suggest that quasi-contractual recovery may no longer be available to plaintiff since the *Lear* decision.

In *Lear*, the United States Supreme Court reversed a judgment previously affirmed by the Supreme Court of California in favor of the owner of a patent allegedly invalid. In so doing, the Supreme Court overruled a line of cases (on which the California court had relied) holding that a licensee could not, as against its licensor, assert patent invalidity. Having directed a reversal for trial of the validity issue, the court then turned to consider the possibility that the licensor might recover on a theory of contract implied in law or in fact. Noting that California had not passed on the licensor's rights under such theories, the Supreme Court said:

> "Our decision today will, of course, require the state courts to reconsider the theoretical basis of their decisions enforcing the contractual rights of inventors and it is impossible to predict the extent to which the re-evaluation may revolutionize the law of any particular state in this regard. Consequently, we have concluded, after much consideration, that even though an important question of federal law underlies this phase of the controversy, we should not now attempt to define in even a limited way the exent, if any, to which the States may properly act to enforce the contractual rights of inventors of unpatented secret ideas. Given the difficulty and importance of this task, it should be undertaken only after the state

> courts have, after fully focused inquiry, determined the extent to which they will respect the contractual rights of such inventors in the future. Indeed, on remand, the California courts may well reconcile the competing demands of patent and contract law in a way which would not warrant further review in this Court." (395 U.S. at 675, 23 L.Ed.2d at p. 625.)

We are cited to no case in which our Supreme Court has attempted the "re-evaluation" thus suggested, even in the narrow field of unpatentable inventions involved in *Lear,* much less in the wider and different field of literary property. Unless and until our own Supreme Court advises us to the contrary, we must determine cases such as that at bench on the basis of the long line of Calirornia literary property cases on which plaintiff, and the appellate court on the former appeal, relied.

In this connection we note that Division Five of this court, in an opinion filed long after the decision in *Lear,* reaffirmed the right of recovery in a case similar to that herein involved, saying:

> "The right of plaintiff's work to protection by reason of sufficient novelty and elaboration of the accessible idea is a prerequisite, of course, in the common law copyright count and also, we feel, in the unjust enrichment-breach of confidence count. This is because they are not based upon, and so do not have the limitations of, contractual promises. This is clear as to the common law copyright situation, and brief contemplation reminds us

that the function of a quasi contract . . . 'is to raise an obligation in law where in fact the parties made no promise.' (Nimmer on Copyright, §168.1, p. 722; and § 171, p. 747, citing *Thompson v. California Brewing Co.*, 150 Cal.App.2d 469 [310 P.2d 436].) It is not based on apparent intentions of the involved parties; it is an obligation created by law for reasons of justice. (*Weitzenkorn v. Lesser* . . . 40 Cal.2d 778, 794.)" (*Fink v. Goodson-Todman Enterprises, Ltd.*, (1970) 9 Cal.App.3d 996, 1009, 1010.)

IV

Plaintiff alleges that defendant is estopped by his own conduct from raising the issue of res judicata. The court in *Lunsford v. Kosanke* (1956) 140 Cal. App.2d 623, held that a defendant was barred from raising res judicata where his position in the prior action was that no relief could be granted under the pleadings, and as a result he induced the ruling that no evidence can be admitted under the pleadings. The court said that where a defendant defeats an action on the grounds that the pleadings do not warrant recovery on the facts, he is estopped in the second action to insist that the second action is barred by a former judgment because the matter might have been settled in the former action. (*Lunsford v. Kosanke, supra* (1956) 140 Cal.App.2d 623.) Since Krasna induced the trial court in the first trial to grant a nonsuit on the second cause of action for breach of implied in law contract, thus preventing trial on the merits on a

matter that could have been settled in the first trial, he is estopped from claiming that plaintiff's action is barred by res judicata.

The judgment is reversed.

Kingsley, *J.*

We concur:

Jefferson, *Acting P. J.*

Frampton, *J. Pro Tem.**

*Retired judge of the Superior Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B.

United States Constitution, Article I, Section 8, Cl. 8:

"The Congress shall have power . . .

"To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."

United States Constitution, Article VI, Cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Title 17, U.S.C.:

"§1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

. . .

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

. . .

§2. Rights of author or proprietor of unpublished work

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

. . .

§4. All writings of author included

The works for which copyright may be secured under this title shall include all the writings of an author.

§5. Classification of works for registration

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

. . .

(d) Dramatic or dramatico-musical compositions.

. . .

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title.

. . .

§11. Registration of claim and issuance of certificate

Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

§12. Works not reproduced for sale

Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; . . ."

California Civil Code:

"§980. (a) The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition.

. . ."